

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL BENITEZ,

Defendant and Appellant.

G041201

(Super. Ct. No. FWV034195)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Raymond L. Haight, III, Judge. Affirmed in part and reversed in part.

Lewis A. Wenzell, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Lynne McGinnis,
Andrew Mestman and Steve Oetting, Deputy Attorneys General, for Plaintiff and
Respondent.

*

*

*

A jury found defendant Samuel Benitez guilty of resisting an officer (Pen. Code, § 69), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and misdemeanor resisting an officer (Pen. Code, § 148, subd. (a)). The court sentenced him to 3 years probation plus 180 days in custody to be served on weekends.

After defendant objected on the ground of hearsay, the acting supervisor of the county's crime laboratory testified, based on notes made by an analyst, that a substance in defendant's possession was methamphetamine. A report produced by the analyst to the same effect was introduced into evidence. The analyst who conducted the tests did not testify. The supervisor described the laboratory's procedures and attested to the analyst's expertise.

Defendant's appeal raises a single issue: was he denied his constitutional right to confrontation when the supervisor was permitted to testify, using another's analysis of the substance. We previously issued an opinion affirming defendant's conviction based upon the decision of the California Supreme Court in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). *Geier* held that reports of DNA test results were not testimonial and therefore the admission of such evidence was not prohibited by *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). (*Geier, supra*, 41 Cal.4th at p. 605.)

Defendant filed his first petition for review and while that petition was pending, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314] (*Melendez-Diaz*). In *Melendez-Diaz* the court held that technicians' certificates analyzing suspected illegal substances constituted testimonial statements "rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Id.* at p. 307.)

The California Supreme Court granted defendant's petition for review and transferred the cause back to our division with directions to vacate our judgment and reconsider the matter in light of *Melendez-Diaz*. After the parties submitted supplemental

briefs we reconsidered the matter as directed. We then reversed defendant's conviction of possession of methamphetamine.

Thereafter, the Attorney General petitioned the California Supreme Court for review. The Supreme Court issued a grant and hold order. Subsequently, the Supreme Court transferred the matter to us under California Rules of Court, rule 8.528(d) with directions to vacate our decision and to reconsider the cause in light of *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*), *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*), and *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*).

The parties again submitted briefs dealing with these cases. And, having reconsidered the cause in the light of the new cases, we again reverse defendant's conviction of possession of methamphetamine. We affirm the remainder of the judgment.

FACTS

Vaughn, the managing supervisor of the analyst who conducted the analysis and created the report, testified based on the analyst's notes that the substance in defendant's possession was 0.02 grams of methamphetamine. These notes were not introduced into evidence. Vaughn produced a single page form entitled "Request for Analysis" (RFA), which was introduced. The RFA contains chain of custody information and identifies material apparently submitted with the form as "Susp. Methamphetamine." The "analysis" portion of the RFA states, "The white crystalline substance (net weight 0.02 gram) contains methamphetamine." The RFA was signed by John Jermain, identified as "analyst," under the statement "I hereby certify the foregoing laboratory analysis to be true under penalty of perjury" and contained an entry of the date and place

of execution. The place to enter the “date and time logged” by the laboratory was left blank.

Vaughn explained the analyst’s notes in terms of their determinative significance and affirmed the results were “all consistent with that substance being methamphetamine” and “appear[ed] to be valid and unexceptional.” Vaughn testified that he knew the analyst complied with required procedures, and that although he “was not there physically to observe” the analyst create his notes, “procedures require us to write [our observations] at or near the time [of analysis].” Throughout Vaughn’s testimony the defense maintained a “standing hearsay objection.”

DISCUSSION

1. Sixth Amendment Background

A criminal defendant’s Sixth Amendment right “[i]n all criminal prosecutions . . . to be confronted with the witnesses against him” (U.S. Const., 6th Amend.) has been implemented by the corresponding rule that “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” (*Crawford*, *supra*, 541 U.S. at p. 59.) Until the United States Supreme Court’s decision in *Crawford*, earlier cases held a witness’s out-of-court statement may be admitted so long as it has adequate indicia of reliability, i.e., falls within a “firmly rooted hearsay exception” or bears “particularized guarantees of trustworthiness.” (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597]) (*Roberts*). *Crawford*, a decision by seven justices, concurred in by two others, held that the Confrontation Clause of the Sixth Amendment precluded introduction into evidence of a statement made by a witness, unable to appear in person, in response to a police interrogation. The court stated “[t]he Constitution prescribes a procedure for determining the reliability of testimony in

criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.” (*Id.* at p. 67.) And thus, “[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” (*Id.* at p. 68.) Unfortunately, the court added “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” (*Ibid.*) And therein lies the rub. Chief Justice Rehnquist (joined by Justice O’Connor), although concurring in the *Crawford* decision, dissented to the extent the opinion overruled *Roberts*. He noted that the majority opinion, “casts a mantle of uncertainty over future criminal trials in both federal and state courts.” (*Crawford, supra*, 541 U.S. at p. 69 [124 S.Ct. 1354] (conc. opn. of Rehnquist, C. J.)

2. Cases Following Crawford

Cases following *Crawford*, both in the United States Supreme Court and in the California Supreme Court have struggled with the “mantle of uncertainty” noted by Chief Justice Rehnquist in determining what is and what is not “testimonial evidence.” Three United States Supreme Court decisions dealing with “testimonial evidence” followed *Crawford*: *Melendez-Diaz, supra*, 557 U.S. 305, *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610] (*Bullcoming*) and *Williams, supra*, 567 U.S. ___ [132 S.Ct. 2221].

In *Melendez-Diaz*, the United States Supreme Court held, five to four, that laboratory analyses contained in sworn “‘certificates of analysis’” identifying a substance found in defendant’s possession as “[c]ocaine,” were not admissible under the rule announced in *Crawford*. (*Melendez-Diaz, supra*, 577 U.S. at pp. 308, 311.) *Bullcoming*, another five to four decision, came to a similar result in holding that a laboratory analyst’s certificate should not have been admitted. (*Bullcoming, supra*, 564 U.S. at p. ___ [131 S.Ct. at p. 2713].) But in *Williams*, the court concluded, again five to four, that a DNA profile obtained from vaginal swabs of rape victim, subsequently used to identify

the defendant, were not subject to the *Crawford* exclusion. (*Williams*, 567 U.S. at p. ___ [132 S.Ct. at p. 2240].)

Although all three cases were decided by a majority of five justices, the justices individual rationales for the decisions did not mesh. Justice Thomas consistently expressed his view that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” (*Melendez-Diaz*, *supra*, 557 U.S. at p. 329 (conc. opn of Thomas, J.) This view is not shared by any other justice. Those who agreed with *Crawford*, considered a number of factors in addition to the formality or solemnity of the statement at issue, including evidence that is “functionally identical to live, in-court testimony” (*id.* at pp. 310-311), evidence that was “made under circumstances which would lead an objective witness reasonably to believe that [it] . . . would be available for use at a later trial” (*id.* at p. 311), and evidence that was created to “provide ‘prima facie evidence’” of a fact to be proved at the trial (*ibid.*).

3. California Cases

This absence of a single majority statement of the rules to be applied to determine what is “testimonial” under *Crawford* has also resulted in the expression of a large number of viewpoints by members of the California Supreme Court. But, fortunately, a majority of the members of the court have agreed to apply a fairly straightforward rule in deciding these issues. In each majority opinion in the three cases (*Lopez*, *Dungo*, and *Rutterschmidt*), all authored by Justice Kennard, the court expresses the view that there are two criteria that must be satisfied to invoke the sixth Amendment’s Confrontation Clause: “First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity.” (*Lopez*, *supra*, 55 Cal.4th at p. 581) “Second, . . . an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.” (*Id.* at p 582.)

Dungo is to the same effect. (See *Dungo, supra*, 55 Cal.4th at p. 619. Although *Rutterschmidt* noted the same issues (see *Rutterschmidt, supra*, 55 Cal.4th at p. 660), the decision did not decide whether the particular report was improperly admitted because the court concluded that “[i]n light of the overwhelming evidence against defendant,” any error would have been harmless. (*Id.* at p. 661.) Although there may be questions about the formula expressed by the majority (see dissent of Justice Liu in *Lopez, supra*, 55 Cal.4th at pp. 590-607 and Justices Corrigan and Liu in *Dungo, supra*, 55 Cal.4th at pp. 633-649), *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, requires us to follow the law as stated by a majority of our high court.

4. *The Report was Erroneously Admitted*

As we noted, a form entitled “Request for Analysis” (RFA), was introduced into evidence. The “analysis” portion of the RFA states, “The white crystalline substance (net weight 0.02 gram) contains methamphetamine.” The RFA was signed by John Jermain, identified as “analyst,” under the statement “I hereby certify the foregoing laboratory analysis to be true under penalty of perjury” and contains an entry of the date and place of execution. The RFA provides the prima facie evidence that the substance found on defendant was in fact a prohibited substance.

Using the two-step analysis of the California Supreme Court cases, it is obvious that both criteria are met. The statement was made “with some degree of formality or solemnity.” (*Lopez, supra*, 55 Cal.4th at p. 581.) It was a declaration under penalty of perjury, the equivalent of an affidavit. Furthermore, the primary purpose for its preparation “pertains in some fashion to [defendant’s] criminal prosecution.” There was no purpose for the preparation of the RFA except to provide the necessary evidence to establish defendant was guilty of possessing cocaine. Furthermore, the type of report involved in this case was essentially equivalent to the certificate in *Melendez-Diaz, supra*,

557 U.S. at p. 308. There the court held “[t]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements.’” (*Id.* at p. 310.)

4. *No Harmless Error*

Confrontation Clause violations are subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. This standard provides that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. [Citations.]” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].) Factors to consider “include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case. [Citations.]” (*Id.* at p. 684.)

Here, the admission of the RFA and Vaughn’s testimony were crucial to establishing the substance was methamphetamine. It cannot be said that, beyond a reasonable doubt, the conviction would have ensued irrespective of the error in admitting the evidence. The Attorney General argues the error was harmless because Vaughn, the managing supervisor of the analyst who prepared the RFA testified based on other notes prepared by the analyst. These notes were not introduced into evidence. Although Vaughn testified in some detail about the procedures used by the laboratory, his conclusion that these procedures resulted in the substance being identified as methamphetamine were solely based on the analyst’s report. They were the conclusions of the analyst and not of Vaughn. Defendant preserved his objection to this evidence by relying on the hearsay rule.

No similarly determinative evidence was properly introduced to establish that the substance found on defendant's person was methamphetamine. It is obvious the jury gave substantial weight to the scientific testing performed. Thus, admission of the RFA and Vaughn's testimony based on the analyst's laboratory notes was not harmless error. Accordingly, the conviction for possession of methamphetamine must be reversed.

DISPOSITION

The portion of the judgment finding defendant guilty of possession of methamphetamine is reversed. The judgment is affirmed in all other respects.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.